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No. 91-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF THE STATES OF LOUISIANA, MARYLAND, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a learning disabled child's parents are entitled to state reimbursement under the Individuals with Disabilities Education Act (IDEA), when they unilaterally place her in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education" which the state is required under 20 U.S.C. §§ 1401(a)(18) and 1412(1) to provide as a condition of receiving federal funding under the Act.

2. Whether a federal court may set aside an "Individualized Education Program" promulgated in accordance with the procedures called for in the IDEA, and affirmed on review by the state educational agencies, on the basis of achievement goals contained in the plan, notwithstanding substantial evidence that the child received educational benefits under the plan.

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BRIEF OF THE STATES OF LOUISIANA, MARYLAND, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Sup.Ct.R. 37, the signatory states respectfully submit this brief as amici curiae in support of Petitioners.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This case involves the states' ability to regulate the provision of publicly funded special education services in private schools. The Fourth Circuit's decision severely restricts that ability and impairs the states' capacity to meet their obligations under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., with serious adverse consequences for both the quality and cost of special education services.

Each state that receives federal funding under the IDEA is responsible for assuring "all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). This obligation extends to students educated in private as well as public schools, and in most states takes

the form of both significant regulatory responsibility and substantial financial obligation. See id., § 1413(a)(4)(B).

The issue in this case is whether state or local education agencies must reimburse parents who unilaterally place children with disabilities in private schools that do not meet the states' special education standards. The Fourth Circuit held that when a local school system has not provided an appropriate education to a student with disabilities, the student's parents may place that student in a private school and obtain reimbursement from the state, regardless of whether the private school meets fundamental educational requirements imposed by the IDEA. This Court should review that decision to address whether the IDEA requires public reimbursement to schools that fail to

satisfy the IDEA's most rudimentary standards.

Furthermore, in finding that the school district's placement in this case was inappropriate, the Fourth Circuit significantly altered the well-settled deferential standard for reviewing school system decisionmaking enunciated in Board of Education v. Rowley, 458 U.S. 176 (1982), by imposing on state and local education agencies an untenable and new standard that (1) requires public agencies to provide a more exacting "free appropriate public education" than is required by the IDEA or this Court's interpretation of that statute, (2) narrows the discretion of educational decisionmakers in developing special education programs, and (3) exposes public agencies to financial liability for costly unilateral private

school placements even when those placements fall far short of the IDEA's standards.

The IDEA imposes upon states the weighty obligation to ensure that all students with disabilities receive an appropriate education, and sets elaborate standards for appropriateness. The decision below makes it substantially more difficult for states, local school systems and private schools approved by the states to meet those standards, while removing many private institutions -- and students -- from the IDEA's reach. Review is warranted, therefore, to clarify the states' role in private school special education placements. Absent that review, state education agencies in the Fourth Circuit will be severely hampered in their efforts to serve students with dis-

abilities in accordance with the IDEA's strict mandates, and regulatory and reimbursement programs in other states will face even greater uncertainty given the widening conflict in the lower courts' treatment of this vitally important issue of public concern. See Pet. for Cert. at 17; App. at 15a.

REASONS FOR GRANTING REVIEW

I. A STATE EDUCATION AGENCY CANNOT MEET ITS OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO STUDENTS WITH DISABILITIES IF IT CANNOT LIMIT PRIVATE EDUCATION PLACEMENTS TO PROGRAMS WHICH ARE APPROVED BY THE STATE AND OTHERWISE MEET THE STANDARDS OF THE IDEA.

In holding that private schools accepting unilateral placements need not meet "the whole panoply of duties" imposed by the IDEA (App. at 16a), the Fourth Circuit now allows such schools to ignore the IDEA's critical educational requirements and still obtain public reimbursement. Review is war-

ranted to determine whether Congress intended the IDEA to compel public agencies to pay for educational programs that fail to comply with the IDEA's most essential statutory duties.

Under federal law, state education agencies (SEAs) must scrutinize carefully non-public programs which serve students with disabilities and ensure that such programs meet the same standards as public school special education programs. The IDEA mandates that all children with disabilities "have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c). 20 U.S.C. § 1401(a)(18) defines "free appropriate public education" as special education and related services which:

> (A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,... [and]

(D) are provided in conformity with the individualized education program....

(Emphasis added).

Thus, the IDEA unambiguously mandates that the SEAs bear standard-setting and monitoring responsibility over all special education programs. Conversely, the IDEA does not exempt private, unilateral placements from the obligation to provide free appropriate public education, or the SEAs from ensuring that private schools meet that obligation. Many SEAs thus operate private school accreditation systems to regulate non-public school placements for conformance with the IDEA.[1]

[1] For example, Maryland law expressly provides that "a child who needs special education services that are not provided in a public county, regional, or State program shall be placed in an appropriate nonpublic educational program that offers these services." Md. Educ. Code Ann. § 8-409(a). That law directs the State Board of Education to develop regulatory (footnote cont'd)

In concluding that a private school which "does not attempt to comply with the terms of the [IDEA]" must nonetheless be paid with public funds for Shannon Carter's placement (App. at 11a), the court below swept aside the IDEA's central command that public agencies ensure all students a free appropriate public education, see, e.g.,

standards for accreditation of non-public programs, and mandates that the standards for non-public entities serving students with disabilities "may not be lower than the standards for the education of children who are enrolled in programs that are operated by a county board." Md. Educ. Code Ann. § 8-403(c).

Accordingly, the Maryland State Board of Education has promulgated regulations to govern the accreditation of non-public special educational programs so that they meet the IDEA's requirements. To gain such approval, the program must meet explicit standards which set forth the minimal criteria for special education services embodied in the IDEA and demanded of public school systems in this state. See Code of Maryland Regulations §§ 13A.09.09; 13A.05.01.11. In addition, the non-public institution must have written policies and procedures ensuring that Individualized Education Programs (IEPs) are developed for each student with disabilities. Id., § 13A.05.01.11(d). Similar regulatory programs exist in other states. See, e.g., North Carolina Procedures Governing Programs and Services for Children with Special Needs § 1527.

20 U.S.C. §§ 1400(c); 1412(1); 1413(a)(2), which the IDEA defines as an education provided by a program that "meets the standards of the State education agency. . . ." Id., § 1401(a)(18)(B). The Fourth Circuit's analysis passed over these fundamental principles by ignoring the statutory definition of free appropriate public education and focusing solely on the language of 20 U.S.C. § 1413(a)(4)(B), which directs the states to ensure that private schools to which public agencies refer students "meet standards that apply to State and local educational agencies . . . ." Id., § 1413(a)(4)(B)(ii). The court reasoned that because this provision applies only to private placements made by public agencies and not to unilateral placements by parents, the student's private school program

here was appropriate. (App. at 13a.)

Neither the IDEA, including the narrow provision cited by the Fourth Circuit, nor any of this Court's decisions support the Fourth Circuit's holding that private schools which unilaterally place students are entitled to state reimbursement merely by providing an education "reasonably calculated to enable the child to receive educational benefits." (App. at 17a, quoting Board of Education v. Rowley, 458 U.S. at 207.) To the contrary, this Court has stated that a reviewing court must make a more complete inquiry in determining whether reimbursement is appropriate under the IDEA:

> [A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed

> through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. at 206-07 (footnotes omitted).

The Fourth Circuit acknowledged that the private school in this case did not even attempt to comply with the IDEA's procedural requirements, noting, for example, that the school did not develop Individualized Education Plans (IEPs) for special education students, and employed teachers who not only fail to meet federal standards for special education personnel, but were not accredited to teach at all in South Carolina public public schools. (App. at 11a-12a.) State reimbursement is simply inappropriate in light of these profound deficiencies in the private school placement here.

Noting "the importance Congress

attached to [the IDEA's] procedural safeguards," this Court has observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation . . . as it did upon the measurement of the resulting IEP against a substantive standard." Rowley, 458 U.S. at 205-06. IEPs serve as "the vehicle for giving content to the required 'free appropriate public education,'" Battle v. Commonwealth of Pennsylvania, 629 F.2d 269, 272-73 (3d Cir. 1980), cert. denied, Scanlon v. Battle, 452 U.S. 968 (1981), and represent the "cornerstone" of the IDEA. See Johnson v. Independent School District, 921 F.2d 1022, 1027 (10th Cir. 1990), cert. denied, 111 S.Ct. 1685 (1991). Unless an educational program is based upon an IEP, therefore, it is

not "appropriate" under the IDEA, and a state cannot use its special education resources to pay for it.

Similarly, the IDEA also does not sanction state reimbursement for services provided by uncertified teachers. The IDEA makes the states responsible for the staff qualifications in private schools. Federal regulations explicitly command that the states set suitable qualifications for personnel providing the IDEA's services to students "served by State, local and private agencies." 34 C.F.R. § 300.153 (a)(1)(ii) (emphasis added). These requirements, at the entry level, must be

> consistent with any State approved or recognized certification, licensing, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

Id., § 300.153(b)(2). Because these requirements were not met in this case and no IEP was developed by the private school, state reimbursement is improper.

II. THE DECISION BELOW EXPOSES THE STATES TO SIGNIFICANT MONETARY LIABILITY AND IMPAIRS THEIR ABILITY TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION AS REQUIRED BY THE IDEA.

The Fourth Circuit's decision also modifies the well-established deferential standard governing the review of special education decisionmaking. See Board of Education v. Rowley, 458 U.S. at 206-07. The Fourth Circuit reached well beyond its authority in setting aside public special education determinations made below, as there are no allegations of procedural violations, and the record demonstrates that the student made significant educational progress when she was served according to Florence County's IEP. See Pet. for

Cert. at 24. The Fourth Circuit identified only one deficiency in Florence County's IEP: that one of the IEP's goals was too modest and prevented the student from achieving more than "minimal or trivial progress." (App. at 8a.) But in rejecting the student's IEP on this basis, the court ignored the record of Shannon Carter's actual experience under the IEP and, more significantly, disregarded this Court's admonition that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Rowley, 458 U.S. at 207.[3]

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[3] It would seem, for example, an exercise in reasonable judgment for Florence County educators to conclude that making four months progress in a ten month academic year is appropriate for a seriously learning disabled student, or to heed the advice of the social worker hired by the student's parents that, for psychosocial reasons, Shannon Carter's academic program should not be too demanding. See Pet. for Cert. at 7. In rejecting wholesale the legitimacy of the valid considerations which may have motivated (footnote cont'd)

The court's decision in this case means that a school system which, at worst, may have merely underestimated a student's academic goals in the context of an effective IEP must now pay for placement in an expensive private school which did not even try to meet the IDEA's requirements for individualized education. That significantly broadens the circumstances under which a public agency's special education program may be found "inappropriate" on some narrow ground, while increasing the states' liability for placement at private programs that do not meet the IDEA's most basic standards.

That liability exposure is substantial, as private school placements constitute the most expensive

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these educational decisions, the Fourth Circuit far exceeded the standard of review established by this Court.

element in the range of special education services. Maryland public agencies in 1991, for example, spent $27,502,354 to educate 564 students in private residential schools, resulting in an average residential placement cost of nearly $49,000 per year.[4] Additionally, when approving private schools, public agencies often are able to negotiate agreements with those schools as to reasonable tuition charges and other fees. Because no such cost controls would apply to unapproved schools that accept unilateral placements, public agencies risk open-ended liability to those institutions under the Fourth Circuit's decision. Therefore, even an otherwise appropriate placement to an unapproved school may

[4] In 1991, 1,355 Maryland students also attended private day programs, at a total cost of $27,528,820.

result in higher costs to the public agencies.

Fiscally strapped state agencies and local school systems now face these risks at the same time they confront the greatest demand ever for special education resources.[5] The Fourth Circuit nevertheless dismissed the seriousness of this problem with the observation that

> parents who unilaterally place their child in an unapproved private school bear substantial risks -- risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education.

(App. at 18a.) Unfortunately, this assessment appears to be inaccurate. In Maryland, where approximately 30 state administrative hearings are held each

[5] In Maryland, for example, annual special education costs rose from $212 million in Fiscal Year 1981 to $571 million in Fiscal Year 1991.

year for all reasons pursuant to the IDEA's due process requirements, 20 U.S.C. § 1415, six cases have already arisen in the first three months of 1992 invoking the decision below to demand reimbursement for unilateral private school placements.

More fundamentally, the decision below threatens the states' ability to ensure that private placements, even at currently approved schools, will meet the IDEA's requirements. In eliminating any state capacity to ensure a free appropriate public education at schools which accept unilateral placements, the Fourth Circuit has substantially diluted the financial incentive which has motivated schools to comply with the IDEA's exacting standards and seek state approval. Because private schools can now obtain public reimbursement for some

special education placements regardless of their IDEA compliance, it is likely that fewer schools will opt to seek approval. Public agencies will thus find themselves with a smaller range of private school programs in which to place students who truly need intensive services, and will be less able to regulate private school providers as a whole for IDEA compliance.

That result directly contravenes Congress' manifest intent that the states vigorously assure that all students with disabilities receive a free appropriate public education, and that federal special education funds should be spent for that purpose alone. This Court should review this case and determine whether, as the Fourth Circuit decided, Congress intended increasingly scarce special

education resources to be used to pay for costly services that do not meet the IDEA's well-established standards.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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